Harding Glass Company, Inc. *and* Glaziers Local 1044, International Brotherhood of Painters & Allied Trades, AFL–CIO. Cases 1–CA–31148 and 1–CA–31158

March 31, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On November 3, 1994, Administrative Law Judge Michael O. Miller issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified,[2] and to adopt the recommended Order as modified.

The judge found that the Respondent unlawfully implemented certain unilateral changes in employment conditions on October 18, 1993,[3] in the absence of a valid impasse in bargaining. He also found that these changes rendered the October 18 strike an unfair labor practice strike from its inception. We agree with the judge that the Respondent violated Section 8(a)(5) by unilaterally implementing its last and final offer in the absence of a valid impasse in bargaining.[4] However, we do not agree that this unlawful implementation occurred on October 18. Concededly, on that date, the Respondent unilaterally established a wage scale for replacement glaziers. However, this action was lawful because the Respondent was privileged to establish unilaterally the terms and conditions of employment of strike replacements. *GHR Energy Corp*., 294 NLRB 1011, 1012 (1989); *Service Electric Co*., 281 NLRB 633, 642 (1986).[5]

We find that the Respondent's unlawful implementation became effective on October 23. On that day, the Respondent announced its intent to implement its final proposals as to the regular (i.e., nonreplacement) employees. On the same day, it implemented these changes.

Union representatives did not actually inform the striking glaziers of the Respondent's changes until October 25. Because the Respondent's initial bargaining proposal contained significant reductions in the compensation paid glaziers and caused them to strike on October 18, we conclude that the unlawful implementation of these very changes had a reasonable tendency to prolong the strike. Accordingly, we find that the strike converted to an unfair labor practice strike on October 25 when the striking glaziers became aware of the Respondent's unlawful implementation of its offer.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for the judge's Conclusion of Law 2.

''2. By threatening employees with discharge and/or shop closure and by promising them higher wages in order to discourage them from supporting or remaining members of the Union, by interfering in the Board's investigation of unfair labor practices, and by encouraging and assisting employees in the filing of a decertification petition, the Respondent has engaged in unfair labor practices affecting commerce within the

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The General Counsel excepts to the judge's failure to specifically order the Respondent to cease and desist from threatening employees with shop closure and to include such a provision in the notice to employees. The record supports the judge's factual findings that the Respondent's president, Mark Goldstein, repeatedly threatened employees within the 10(b) period, including on November 5, 1993, that he would close down if they did not get rid of the Union. We find merit in the General Counsel's exception and will modify the judge's conclusions of law, recommended Order, and notice accordingly.

We also find merit in the General Counsel's exception to the judge's failure to order the Respondent to reinstate unfair labor practice strikers on their unconditional offer to return to work. We will modify the judge's recommended remedy, Order, and notice accordingly.

[3] All dates are in 1993 unless otherwise indicated.

[4] In adopting the judge's finding that there was no valid impasse in bargaining prior to the Respondent's unilateral implementation of its offer, we do not rely on the Respondent's hiring of replacement glaziers on October 18 at reduced wages or on the Respondent's postimplementation sponsorship of the decertification effort.

[5] Member Browning does not agree with precedent holding that employers have no obligation to bargain about the terms and conditions of employment for striker replacements during the course of an economic strike. In her view, the employer's duty to bargain with the union encompasses all unit employees, including both the strikers and the replacements (as well as any nonstrikers and returning strikers who may be working), because all such employees are members of the bargaining unit. As part of its obligation to bargain with the union in good faith, the employer must maintain existing terms and conditions of employment during the pendency of negotiations until a lawful impasse is reached, at which point the employer is privileged to implement only those terms and conditions that are consistent with its last offer to the union. Member Browning believes that these principles should be applied to govern the terms and conditions of all unit employees, including replacement workers during an economic strike. Accordingly, in this case, she would find that the Respondent's unilateral establishment of a wage scale for the two replacement glaziers on October 18 was unlawful, because the scale differed from that offered to the Union in negotiations. Thus, the economic strike was converted to an unfair labor practice strike on the day that it commenced, October 18.

meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.''

2. Substitute the following for the judge's Conclusion of Law 5.

''5. The strike which began on October 18, 1993, converted to an unfair labor practice strike on October 25, 1993.''

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of the Act, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. We have found that the economic strike that began on October 18, 1993, was converted to an unfair labor practice strike on October 25, 1993. Accordingly, the Respondent shall, on application, offer immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges, to all striking employees who were not permanently replaced before October 25, 1993.

Having found that by implementing its last contract proposal in the absence of a valid impasse, thereby unilaterally and unlawfully changing the terms and conditions of employment of the employees in the appropriate units, the Respondent shall, on request of the Union, restore the terms and conditions of employment which were in effect on October 23, 1993, and make its employees whole for any losses they experienced as a result of this unilateral action.[6]

Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by failing since October 23, 1993, to make contractually required payments to various benefit funds, the Respondent shall, on request of the Union, make whole its unit employees by making all payments that have not been made since October 23, 1993, and that would have been made but for the Respondent's unlawful failure to make them, including any additional amounts applicable to such delinquent payments as determined in accordance with the criteria set forth in *Merryweather Optical Co*., 240 NLRB 1213, 1216 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make such required payments as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[7] Nothing in our remedial order should be construed as authorizing the Respondent to take back benefits conferred without a request from the Union.

ORDER

The National Labor Relations Board orders that the Respondent, Harding Glass Company, Inc., Worcester, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge or shop closure and promising them higher wages in order to discourage them from supporting or remaining members of the Union, interfering with the Board in its investigation of unfair labor practice charges, and encouraging and assisting employees in the filing of a decertification petition.

(b) Unilaterally changing the terms and conditions of employment of its employees in the appropriate units without first bargaining to impasse with the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request of the Union, restore all terms and conditions of employment to the status quo as it existed on October 23, 1993.

(b) On request of the Union, make whole all employees for any losses they suffered as a result of the unilateral changes in terms and conditions of employment, with interest in the manner set forth in the remedy section of this decision.

(c) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate units concerning terms and conditions of employment and, if agreements are reached, embody those agreements in signed understandings:

> All glaziers employed by Respondent performing the work described in the preamble of the Glaziers Agreement between Glass Employers Group of Greater Boston, Inc., and the Union, which expired on October 16, 1993.
>
> All glassworkers employed by the Respondent as described in Article III of the Glassworkers Agreement between Glass Employers Group of

[6] Where, as here, it is unclear whether an employer's unilateral changes in their entirety have been detrimental to employees or beneficial, the Board's customary policy is to issue a restoration order conditioned on the affirmative desires of the affected employees as expressed through their bargaining agent. E.g., *Dura-Vent Corp*., 257 NLRB 430, 433 (1981).

[7] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the Employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

Greater Boston, Inc., and the Union, which expired on October 16, 1993.

(d) On application, offer immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, to all those employees who went on strike on October 18, 1993, and were not permanently replaced prior to October 25, 1993, discharging if necessary any replacements hired on or after October 25, 1993.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its facility in Worcester, Massachusetts, copies of the attached notice marked ''Appendix.''[8] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with loss of their jobs or shop closure or promise them higher wages in order to discourage them from supporting or remaining members of the Union.

WE WILL NOT interfere with the National Labor Relations Board in its investigation of unfair labor practice charges.

WE WILL NOT encourage or assist employees in the filing of a decertification petition.

WE WILL NOT unilaterally change the terms and conditions of employment of our employees without first bargaining to impasse with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request of the Union, restore all terms and conditions of employment to the status quo as it existed on October 23, 1993.

WE WILL, on request of the Union, make whole all our employees for any losses they suffered as a result of the unilateral changes in terms and conditions of employment, with interest.

WE WILL, on request, bargain collectively with the Union with respect to rates of pay, wages, hours of work, and other conditions of employment of employees represented by the Union in the appropriate units set forth below and, if agreements are reached, embody those agreements in signed understandings:

All glassworkers employed by us performing the work described in the preamble of the Glaziers Agreement between Glass Employers Group of Greater Boston, Inc., and the Union, which expired on October 16, 1993.

All glassworkers employed by us as described in Article III of the Glassworkers Agreement between Glass Employers Group of Greater Boston, Inc., and the Union, which expired on October 16, 1993.

WE WILL, on application, offer immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges to all those employees who went on strike on October 18, 1993, and were not permanently replaced prior to October 25, 1993, discharging if necessary, any replacements hired on or after October 25, 1993.

HARDING GLASS COMPANY, INC.

Karen Hickey, Esq., for the General Counsel.
Robert Weirauch, Esq., for the Respondent.
James Farmer, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was tried in Boston, Massachusetts, on July 13 and 14, 1994, based on charges filed on November 23 and 29, 1993,[1] by Glaziers Local 1044, International Brotherhood of Painters & Allied Trades, AFL–CIO (the Union), as thereafter amended, and a consolidated complaint issued by the Regional Director for Region 1 of the National Labor Relations Board (the Board) on February 28, 1994, as thereafter amended. The complaint alleges that Harding Glass Company, Inc. (the Respondent or the Employer) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by making threats and promises to discourage continued union adherence, by encouraging and assisting employees in the filing of a decertification petition, by interfering with the Board's investigation of unfair labor practice charges, and by unilaterally implementing its contract offer in the absence of a bona fide impasse in collective bargaining. Respondent's timely filed answer denies the commission of any unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by counsel for the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS—PRELIMINARY CONCLUSIONS OF LAW

The Respondent, a corporation, is engaged in the wholesale and retail sale and installation of glass for automobiles and commercial and industrial buildings at its facility in Worcester, Massachusetts.[2] In the course and conduct of its business operations during the calendar year ending December 31, 1993, Respondent purchased and received goods and materials valued in excess of $50,000 which were shipped to it directly from points located outside the Commonwealth of Massachusetts. During that same period of time, Respondent performed services within the Commonwealth of Massachusetts valued in excess of $50,000 for enterprises which were directly engaged in interstate commerce. The Respondent admits and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admits, and I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

A. *Background*

The Employer and the Union have had a longstanding collective-bargaining relationship wherein the Union has represented Respondent's employees in two units, one of glaziers[3] and another of glassworkers.[4] The most recent agreements ran from November 2, 1991, to October 16, 1993. Respondent is the last unionized glass company in the Worcester area and the only one west of the Boston area. Mark Goldstein is Respondent's president. James Farmer is the Union's business manager.

In October, Respondent had three glassworkers, Dana Whitney, Roger Demers, and Robert Mosely, and two glaziers, James Tritone and Charles Jones. The glassworkers repaired and replaced automobile glass, cut glass, and fabricated metal. They sometimes assisted the more highly skilled, and more highly paid, glaziers, who could repair, fabricate, and install storefronts and install windows in new commercial construction.

B. *The Negotiations*

On June 30, Goldstein notified Farmer that Harding Glass desired to negotiate its new agreements separately from the Glass Employers Association. Farmer responded, terminating the existing agreements on their expiration date, October 16, and indicating a willingness to meet and bargain. Goldstein proposed that negotiations begin in early October; the first meeting was held on October 8.

Goldstein, Farmer, and Business Representative Joe Guliano met at a coffeeshop on the afternoon of October 8 for the initial bargaining session. Goldstein laid out his concerns; as the only union glass shop in the Worcester area, Harding Glass was not competitive, he asserted. In particular, he complained about the wages and benefits of the glaziers, which totaled over $30 per hour. The Union made no specific offer but suggested that Goldstein was not taking advantage of several provisions of the existing agreements, provisions which would permit him to use the lower paid glassworkers to do more of the work which Respondent was paying glaziers to do and allow him to pay a reduced wage rate (80 percent of their wage rate) under the market recovery program to the glaziers when they worked on open shop projects. Goldstein recalled Farmer criticizing the way he ran his business, in particular the size of his office staff.[5] He also recalled Farmer suggesting that he eliminate his glaziers, continuing his business with lower paid glassworkers. Goldstein maintained that this was impractical and unsafe. The meeting ended with an agreement to meet again; no date was established.

On October 12, Goldstein asked, in writing, to ''meet one more time to discuss my position with an effort to reach an agreement.'' Farmer agreed to meet, but again, no date was set. Goldstein responded with a letter, dated October 13, setting out his positions. He proposed a 1-year agreement which included provisions to reduce the glaziers' hourly wage rate from $22.05 to $13.73 per hour, raise the auto glass mechan-

[1] All dates are 1993 unless otherwise indicated.

[2] For some or all of the period involved here, Respondent maintained a second facility, known as Harding Auto Glass Company, Inc., at a separate nearby location. Respondent stipulated, for the purposes of this case only, that it and Harding Auto Glass Company, Inc. constituted a single employing entity.

[3] The appropriate unit for glaziers consists of all glaziers employed by Respondent performing the work described in the preamble of the Glaziers Agreement between Glass Employers Group of Greater Boston, Inc. and the Union, which expired on October 16, 1993.

[4] The appropriate unit for glassworkers consists of all glassworkers employed by the Respondent as described in art. III of the Glassworkers Agreement between Glass Employers Group of Greater Boston, Inc. and the Union, which expired on October 16, 1993.

[5] Farmer apparently said this to Goldstein on several occasions during the brief course of the negotiations.

ics' pay by 50 cents (to a top rate for glassworkers of $13.73), eliminate all contributions to the health, welfare, pension, and annuity funds, substituting other health insurance and a promise to look into profit sharing, and include the glaziers in the vacation and holiday benefits of the glassworkers (which they did not previously receive), but with the elimination of the existing birthday and Christmas Eve holidays for everyone. He asked to meet as soon as possible, noting that the current agreement expired on October 16.

Goldstein and Farmer met again on October 14. Goldstein stated that he had to have what he had proposed in order to stay in business; Farmer protested that he was looking for a lot of givebacks, virtually everything that the glaziers had negotiated over the years, and stated that the glaziers would not agree to his proposal. He agreed to Goldstein's proposed wage rate for the glassworkers and suggested that Goldstein just sign a glassworkers' agreement. Then, if Respondent bid work requiring glaziers, i.e., larger or prevailing wage jobs, the Union would provide them from the hall.[6]

Farmer indicated that the Union could work with the health, welfare, pension, and annuity benefits as proposed by Goldstein. However, he noted that if contributions to the annuity fund ceased, the employees would lose those contributions which had already been made on their behalf. He suggested that some money be deducted from their wages to maintain annuity fund contributions. Goldstein promised to get back to Farmer on that issue.

On October 15, Goldstein rejected the Union's suggestion for taking the pension or annuity money from the wage package. He wrote that he did ''not want to be faced with any potential contingent liability.'' Farmer's subsequent attempts to convince him that the funding was more than adequate to avoid any such liability were unavailing.

The Union held separate membership meetings for the glaziers and the glassworkers on October 17 to consider the contract offers of the employer association and those proposed by Respondent. Respondent's glaziers came to the meeting, were presented with Goldstein's proposal, noted that it appeared as if the Employer was seeking to get rid of them, and rejected it. In addition, they voted to strike and to establish a picket line. Respondent's glassworkers did not come to the meeting scheduled for their consideration of the glassworkers' contracts but agreed not to cross the glaziers' picket line.

On the conclusion of the meeting, the Union sent a facsimile message to Respondent, rejecting its offer. It stated, ''We are ready and willing to continue negotiations'' and asked that Goldstein indicate when he was available. The fax contained no reference to the strike vote. However, a picket line was set up on October 18 and no employees worked. Goldstein responded on October 20, indicating an availability to meet on either of the next 2 days.

[6] The essence of Farmer's proposal was that Respondent would be able to do all of its current work, except prevailing wage jobs, with employees designated and paid as glassworkers. It would not be permitted to retain the existing glaziers under a glaziers' agreement at the reduced rate, but would be permitted to hire anyone, including those who had formerly been glaziers or who possessed the requisite skills to perform the required work. While, as noted infra, this is what Respondent ultimately did, it appears that Respondent did not, or purported not to, so understand Farmer's proposal.

They met again on October 22 or 23. As credibly related by Farmer and Guliano, the discussions revolved around making Respondent competitive while keeping the men working and maintaining a union relationship. Farmer reiterated and expanded on the earlier suggestions that Respondent utilize the market recovery rate and that it operate solely under a glassworkers' agreement, with those glassworkers being allowed to work on any jobs up to a contract value of $20,000, including that work which had previously been done by glaziers. On larger jobs, the Union would refer glaziers, as needed. The wage increase for glassworkers, as proposed by Goldstein, which was the same as had been agreed to by the employer association, was accepted, and there was at least a tentative agreement with respect to the health and welfare benefits. There was discussion of eliminating the annuity but continuing some pension benefits; Farmer's testimony as to this was vague. Farmer did not offer to let Respondent employ the glaziers under the terms of the glassworkers' contract but, as he explained, Respondent could have hired them, if they were willing, or anyone else, as glassworkers.

As Goldstein recalled the discussions, he insisted that he needed glaziers to operate his business and was never told that he could hire glaziers and pay them the glassworkers' rate. Goldstein continued to object to making pension fund contributions, asserting a fear of a future liability. Farmer made no wage proposal and, from Goldstein's point of view, had offered nothing to settle the strike.

Farmer and Guilano left that meeting feeling that agreement was close. Goldstein had just the opposite impression, believing that the Union was not going to make a proposal.

On October 23, Goldstein rejected what he deemed to be the Union's proposal, as unacceptable. In his testimony, he claimed that he was referring to the Union's verbal proposal that he use the 80-percent market recovery rate and get rid of his glaziers. In testifying further, he stated that he did not consider Farmer's suggestion to continue under the glassworkers' agreement, with a 50-cent raise for those employees as Goldstein had proposed, for all jobs up to $20,000, to be a proposal ''because its an unworkable proposal.'' His type of business, he said, had to have glaziers. His faxed letter went on to state that he was implementing his last offer.

Following receipt of the October 23 letter, Farmer called Goldstein, told him that he was destroying the business his father had built, and suggested that they should sit down and work something out. Goldstein insisted that there was ''nothing to work out.''

C. *Dealings with the Employees*

About October 18, Goldstein had called Whitney, asking to meet with the inside glassworkers and threatening them with replacement if they failed to return to work. As Whitney recalled the conversation, Goldstein stated that he could not afford the Union, that he had to get rid of it because he could not make a profit or be competitive. This statement was a reiteration of statements repeatedly made to Whitney and other employees throughout the spring and summer. Both Charles Jones and Tritone credibly recalled Goldstein making statements to the effect that he would either get rid of the Union or close the doors (as recalled by Jones) or that he would not be able to stay in the Union if he had to con-

tinue paying the wages he was paying (as recalled by Tritone).[7]

On October 18, Respondent hired James Waszkiewicz and James Gabrielle as glaziers. They had only limited experience; their duties included replacing small pieces of plate glass, cutting glass for tabletops, and doing some fabrication. Because of their limited experience, they were paid $11 per hour. Unlike the glassworkers' agreement, which provided a sliding scale of wages, depending on the grade to which an employee is assigned, the glaziers' contract contained no lower rate for less experienced employees. It did provide for an apprenticeship program, with a sliding scale, but participation in that program required union participation. Waszkiewicz and Gabrielle were not apprentices.

Goldstein and the inside glassworkers, Whitney, Demers, and Mosely, met on the same day that Goldstein rejected the Union's proposal, October 23. Goldstein told them that he needed them at work, showed them the proposal he had made to the Union, and said he was willing to give them the same terms. He repeated his threat to replace them if they failed to return.[8]

The Union maintained its picket line and the glaziers did not return to work. However, Whitney, Demers, and Mosely resigned from the Union and returned to work on October 25.[9] They were paid under the terms which Goldstein had offered the Union, a 50-cent raise and Blue Cross HMO health insurance but no contributions to the Union's health, welfare, pension, or annuity funds. Respondent's last contribution to those funds was for the month of October. The employees also lost two holidays. Goldstein subsequently hired another employee as a glazier, paying him $13.73 per hour; Tritone returned to work in April, as a glazier, at that same rate.

On November 5, Goldstein spoke with Whitney, Mosely, and the two new employees, Gabrielle and Waszkiewicz, in the office, with his bookkeeper, Carol Hamilton, present. He told the employees that they had to get rid of the Union, that he could not afford the benefits and that, if they couldn't get rid of the Union, he would close down. He said that they should submit a letter stating that they no longer wanted to be represented by the Union. Hamilton typed that letter, using language provided by Goldstein, and everyone signed it in his presence.

After work that day, Goldstein spoke with Whitney at a pool hall across from the Employer's facility. He asked Whitney to come in early on Monday so that he could go to Boston and file a petition with the Labor Board. Whitney was told that he should be the one to do it because he was the senior employee and Goldstein promised him a raise to the foreman's rate (to replace Demers who had quit on November 5) when the Union was gone.

On Monday, November 8, Whitney punched in early. Goldstein drove him to a restaurant where Whitney waited while Goldstein took his daughter to school. Goldstein returned and they drove, in Goldstein's vehicle, to Boston. Along the way, they stopped at another restaurant where Goldstein gave Whitney a completed decertification petition and a second, blank, petition form. He told Whitney to copy the petition over; the signature list, which had been signed on Friday, was appended to it. They then got back in Goldstein's van and drove to the NLRB office in Boston. Whitney was dropped off at the donut shop across from the Federal building, with instructions to go in and talk to the Board agent, while Goldstein drove around so as not to be seen. Whitney did as he was instructed, filed the petition, and met Goldstein after he had completed this task and the two men returned to Worcester. Whitney was paid for a full day's work.[10]

After the initial unfair labor practice charges were filed, a Board agent attempted to contact Whitney, calling him at work. Goldstein told Whitney that he did not have to talk with the Board, that he did not need the aggravation; Whitney refused to give a statement. About a week later, that investigator appeared at Whitney's home in Gardner, Massachusetts. Whitney again refused to cooperate, expressing a fear for his job. When he returned to work the next day, Whitney told Goldstein of the agent's visit. Goldstein replied that the agent had spoken with him about an hour before appearing in Whitney's driveway and had asked Goldstein where Gardner was. Goldstein then told Whitney to ''keep his mouth shut,'' say nothing to the Labor Board, and additionally told Whitney that if he pulled the petition, he wouldn't have a job.[11]

D. *Analysis*

1. Section 8(a)(1)

Threats—Contrary to Respondent's contentions, I find that Goldstein did more than merely complain that the union wages made his business noncompetitive. He went further,

[7] Goldstein acknowledged telling his employees that he was paying more than twice what his competition was paying and was unable to bid jobs and make a profit and admitted telling Tritone that he would not be able to stay in the Union if he had to pay union wages. He denied making statements about ''getting out of'' or ''getting rid of'' the Union. I find the mutually corroborative testimony of these employees more convincing than Goldstein's denials.

[8] On direct examination, Whitney had testified to a statement by Goldstein to the effect that the offer ''wasn't written in stone'' and could be changed in discussions between them. He made no reference to any such offer in describing this conversation on cross-examination. Accordingly, while I find him to be a generally more credible witness than Goldstein, I find the evidence insufficient to warrant a conclusion that Respondent offered to engage in such direct dealing. I do find, based on Whitney's testimony, that these discussions were initiated by Goldstein.

[9] Whitney testified that he resigned following his meeting with Goldstein because he knew that it was against union rules to work in a nonunion shop. He typed and mailed the letter himself; the language was Goldstein's.

[10] Goldstein denied the foregoing account in its entirety. The detail contained in Whitney's account, together with his overall demeanor, the fact that two striking employees related conversations with Whitney, immediately after the petition was filed, substantiating aspects of that account, and Respondent's failure to adduce the testimony of the bookkeeper satisfy me that Whitney's testimony was truthful. I note, moreover, that Whitney's payroll records for November 8 show that he not only clocked in for a full 8 hours on that day, but that he also was on the clock for overtime. That Whitney's affidavit confused the location of the conversation concerning his signing of the resignation letter with the one about the filing of the petition does not, in my opinion, warrant a contrary conclusion.

[11] I credit Whitney's account. I am constrained to comment that an investigative technique which reveals the identity of witnesses to a respondent jeopardizes both the investigation and the job security of those witnesses.

repeatedly threatening, from early spring through late fall, that he would have to either get out of the Union or ''close his doors.'' These statements went beyond lawful predictions of the economic consequences of continued union representation supported by objective facts. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). They were threats posing an unlawful alternative to the employees, either get rid of the Union or suffer the loss of their jobs. As such, they are coercive and violative of Section 8(a)(1). *Debber Electric*, 313 NLRB 1094, 1097 (1994); *Ideal Elevator Corp.*, 295 NLRB 347, 351 (1989).

An additional threat, coercive and in violation of Section 8(a)(1), occurred in December when Goldstein told Whitney that he would not have a job if he ''pulled the petition.''

Promises—I have credited Whitney's testimony and found that Goldstein promised him a raise, to the foreman's rate of $15.23, ''when the Union was gone'' in order to induce him to file the decertification petition. Such a promise violates Section 8(a)(1). *Yale New Haven Hospital*, 308 NLRB 363, 368–369 (1992). See also *Marriott Corp.*, 310 NLRB 1152 fn. 1 (1993). It is irrelevant that Whitney never got the raise or that he may have bragged about the raise he expected to receive.

Involvement in the Decertification Petition—The decision whether or not to decertify their Union and the responsibility to prepare and file a decertification petition belong solely to the employees. Other than to provide general information about the process on the employees' unsolicited inquiry, an employer has no legitimate role in that activity, either to instigate or to facilitate it. *Lee Lumber & Building Material*, 306 NLRB 408 (1992). An employer may not solicit its employees to circulate or sign decertification petitions and it may not threaten employees in order to secure their support for such petitions. *Caterair International*, 309 NLRB 869 (1992). An employer may not provide more than ministerial aid in the preparation or filing of the petition. *Pic Way Shoe Mart*, 308 NLRB 84 (1992).

Respondent went far beyond the above-stated limits. It solicited employee support for the decertification, backing that solicitation with threats, and it solicited, with the promise of a raise, one employee to file that petition in his own name. It then provided the form and the language for the petition, without any request by an employee that it do so, and provided both the time (on the clock) and transportation necessary to see that the petition was filed. Its conduct in this regard clearly interfered with rights reserved to the employees and violated Section 8(a)(1). The petition resulting from this conduct is, of course, tainted. *Tyson Foods*, 311 NLRB 552, 569 (1993); *Lee Lumber*, supra.

Interference with Board Proceedings—By advising an employee that he or she need not honor a Board subpoena, an employer violates Section 8(a)(1) because such conduct tends ''to impede the Board in the exercise of its power to compel the attendance of witnesses in its proceedings'' and tends, further, ''to deprive employees of the vindication or their rights through the participation of witnesses in a Board proceeding.'' *Bobs Motors*, 241 NLRB 1236 (1979). See also *Windsor Castle Health Care Facilities*, 310 NLRB 579, 592 (1993). The Act's protections, moreover, extend beyond its formal proceedings and exist independent of the issuance of a subpoena. Employees have the right to assist the Board in its investigation of unfair labor practice charges; they have the right to have the Board conduct complete investigations of their charges without interference by the employer. The Board's ''channels of information'' must be maintained free from ''employer intimidation of prospective complainants and witnesses.'' *NLRB v. AA Electric Co.*, 405 U.S. 117, 121, 123 (1972), quoting from *John Hancock Mutual Life Ins. Co. v. NLRB.*, 89 U.S. App. D.C. 261, 263, 191 F.2d 483, 485 (1951). See *Art Steel California, Inc.*, 256 NLRB 816, 821–822 (1981), and *Debber Electric*, supra at 1100.

In mid-December, and on several occasions prior thereto, when a Board agent sought to interview Whitney in reference to the decertification petition, Respondent told Whitney that he did not have to speak to that agent, that he should not talk to that agent, and that he should order the agent off of his property. Goldstein told him, further, that he should ''keep his mouth shut'' and threatened his job security if he ''pulled the petition.'' I find that by such statements, Respondent impeded the Board in the course of its investigatory functions and thereby interfered with the employees in the exercise of their statutory rights in violation of Section 8(a)(1).

2. Section 8(a)(5)

Respondent does not dispute that it unilaterally implemented what it deemed to be its final offer, changing pay rates, and fringe benefits. It raised the pay of the glassworkers, reduced the pay of the glaziers, eliminated health, welfare, pension, and annuity fund contributions, and changed the holiday and vacation benefits. For the most part, the changes took effect on and after October 23 and were consistent with Respondent's offer. However, for the two new glaziers, the wage changes were implemented on October 18. Those wage changes did not comport with what Respondent had offered the Union.

Unilateral changes are not unlawful under all circumstances. As the Board stated in *Taft Broadcasting*, 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968):

> An employer violates his duty to bargain if, when negotiations are sought or in progress, he unilaterally institutes changes in existing terms and conditions of employment. On the other hand, after bargaining to an impasse, that is, after good-faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes that are reasonably encompassed within his pre-impasse proposals. [Citations omitted.]
>
> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors. . . .

Application of the foregoing standards to the facts of this case leads me to conclude that there was no impasse reached here. Bargaining had only begun on October 8 and the parties had met but three times, for no more than a total of 3 hours. Respondent had proposed Draconian cuts, cuts warranting more extensive discussion that these truncated negotiations permitted. Contrary to Goldstein's opinion, the Union

had made suggestions and proposals, major concessions which were intended to meet Respondent's needs. Significantly, although the Union was putting economic pressure on Respondent, negotiations continued during the strike and the Union had sought and not rejected further negotiations. There was agreement on the wages for glassworkers and on the elimination of contributions to most of the fringe benefit funds.

I view the Union's offer to permit Respondent to use glassworkers to perform all of the work of the glaziers except for work done on major projects as essential agreement to what Respondent had asked for with regard to the glaziers. Respondent's proposal was to reduce the pay of the glaziers by approximately 40 percent, paying them at the same wage as the class I glassworkers. The Union's proposal would have freed Respondent from all of the obligations of the glaziers' agreement, permitting it to hire whomever it could, including experienced glaziers, to perform, under the glassworkers' agreement, virtually all of the work previously done under the two contracts. The limited exception pertained to larger jobs, those exceeding $20,000, for which the Union would provide him with glaziers, to be paid on the glaziers' scale. These would, by and large, be jobs requiring union scale and were not the market in which Respondent was competing.

I note that what the Union proposed is essentially what happened after Respondent implemented its proposal. The glaziers refused to accept Respondent's proposal and went on strike. Goldstein then hired others to work as glaziers, paying them at the rate he had offered for class I glassworkers, or less, and providing them with the benefits he had offered for both the glaziers and the glassworkers.

On October 23, the parties were in disagreement with respect to pension fund contributions but there is nothing in this record to suggest that their positions were fixed and immutable. There had not been enough discussion on the issue to have reached that point and the Union had not foreclosed further discussion of the issue.

Finally, I must take note of Respondent's other conduct and its attitude toward continued union recognition, Thus, while the General Counsel does not contend that Respondent bargained in bad faith, I cannot ignore Respondent's repeated statements, before, during, and after bargaining, that it not only had to have relief from union wages but that it intended to be free of any union obligations. I cannot ignore the fact that Respondent unilaterally determined what wages it would pay to Waszkiewicz and Gabrielle when it hired them on October 18 to do work coming under the glaziers' jurisdiction, wages which comported with neither the terms of the just expired agreement nor those which Goldstein had proposed. Neither can I ignore Respondent's subsequent actions directed toward effectuation of its intention to eliminate the Union. Even if Respondent had bargained in good faith, he was predisposed to rush to a conclusion that an impasse had been reached. He apparently had so concluded after only one brief meeting, asking on October 12 only to ''meet one more time to discuss my position with an effort to reach agreement.''

There was, I find, no impasse. In the absence of impasse, Respondent's unilateral implementation of its last and only offer, breaches its duty to bargain in good faith and violates Section 8(a)(5) of the Act.

3. The strike

Respondent's employees commenced an economic strike on October 18. On that same date, Respondent commenced on a course of unilateral changes, changes which I have found occurred before any impasse in bargaining. Within 2 to 3 weeks, Respondent also began to undermine the Union's status among its employees, with threats, promises, and unlawful support and encouragement of a decertification petition. Such conduct, I must find, prolonged the strike, which continues to this date, and converted that strike to one which must be deemed an unfair labor practice strike.

CONCLUSIONS OF LAW

1. The following constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All glaziers employed by Respondent performing the work described in the preamble of the Glaziers Agreement between Glass Employers Group of Greater Boston, Inc., and the Union, which expired on October 16, 1993.
>
> All glassworkers employed by the Respondent as described in Article III of the Glassworkers Agreement between Glass Employers Group of Greater Boston, Inc., and the Union which expired on October 16, 1993.

2. By threatening employees with discharge and by promising them higher wages in order to discourage them from supporting or remaining members of the Union, by interfering in the Board's investigation of unfair labor practice charges, and by encouraging and assisting employees in the filing of a decertification petition, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

3. By unilaterally changing the terms and conditions of employment of its employees without first bargaining to impasse with the Union, the Respondent has violated Section 8(a)(5) and (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. The strike which began on October 18 was prolonged by Respondent's unfair labor practices and was converted to an unfair labor practice strike as of that same date.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take affirmative action designed to effectuate the policies of the Act.

Having found that by implementing its last contract proposal in the absence of a valid impasse, thereby unilaterally and unlawfully changing the terms and conditions of employment of the employees in the appropriate units, I shall recommend that Respondent be required to restore the terms and conditions of employment which were in effect on October 18, 1993, and make its employees whole for any losses they experienced as a result of this unilateral action, with interest

as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]